

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION**

THE GENERAL LAND OFFICE OF THE
STATE OF TEXAS, and GEORGE P. BUSH, in his
official capacity as Commissioner of the Texas
General Land Office,

Plaintiffs,

v.

JOSEPH R. BIDEN JR., in his official capacity as
President of the United States, *et al.*,

Defendants.

No. 7:21-cv-00272

Hon. Micaela Alvarez

THE STATE OF MISSOURI; THE STATE OF
TEXAS,

Plaintiffs,

v.

JOSEPH R. BIDEN JR., in his official capacity as
President of the United States, *et al.*,

Defendants.

No. 7:21-cv-00420

(formerly No. 6:21-cv-00052)

Hon. Micaela Alvarez

**DEFENDANTS' NOTICE OF AMENDMENT TO THE DEPARTMENT OF
HOMELAND SECURITY'S BORDER WALL PLAN**

1. Defendants hereby notify the Court and parties in the above-captioned cases that the Department of Homeland Security (DHS) has amended its Border Wall Plan Pursuant to Presidential Proclamation 10142.

AMENDMENT TO DHS BORDER WALL PLAN

2. On January 20, 2021, the President issued Proclamation 10142, *Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, 86 Fed. Reg. 7225 (Jan. 20, 2021). In accordance with the requirements of section 2 of the Proclamation, DHS issued a plan on June 9, 2021, explaining the policies that would guide DHS's expenditure of its border barrier system appropriations from fiscal years 2017–2021. *See* ECF No. 24-2 (the Plan). On July 11, 2022, DHS amended the plan to set forth additional policies and proposed uses for its appropriations from fiscal years 2018–2021.¹ *See* Second Declaration of Paul Enriquez ¶ 12 (attached), Exhibit J (the Amendment).

3. First, the Amendment explains that DHS's barrier system appropriation from fiscal year 2020 is available to fund close-out, remediation, and mitigation actions at the former Department of Defense (DoD) border wall projects sites. *See* Amendment § III. The Plan originally stated that only fiscal year 2021 funds would be used for this purpose. *See* Plan § 4. Since release of the Plan, DHS has been assessing how to best use its barrier system appropriations in accordance with their purpose. *See* Amendment § I. Based on those assessments, DHS found that the remediation and mitigation requirements from past barrier construction at the DoD project sites were more substantial than originally anticipated. *See id.* Accordingly, DHS intends to use both its fiscal year 2020 and 2021 barrier system appropriations to fund close-out, remediation, and mitigation work at the former DoD projects sites. *See id.* §§ III.A., IV.A.

4. Second, the Amendment explains that DHS intends to spend its fiscal year 2018–2021 funds on the installation of barrier system attributes, which may include, as appropriate to each location,

¹ The amendment does not address DHS's border barrier system appropriations from fiscal year 2017 because those funds expired on September 30, 2021. *See* Department of Homeland Security Appropriations Act, 2017, Pub. L. No. 115-31, Div. F, Title VI, 131 Stat. 135, 433–34.

lighting, cameras, and detection technology, in areas where physical barrier has already been constructed. *See* Amendment § 1. Installation of barrier attributes is consistent with the purpose of the fiscal year 2018–2021 appropriations, will enhance the functionality of previously-constructed barrier, and can be implemented in a manner that is consistent with the planning criteria and other principles of the Plan. *Id.* Installation of barrier system attributes are a key component of the barrier system and enhance the overall effectiveness of the system. Second Enriquez Decl. ¶ 14. System attributes such as lighting, cameras, and detection technology will provide Border Patrol agents with domain awareness, which is critical in both remote and urban areas. *Id.* Domain awareness also provides agents with the ability to track and respond to illicit cross-border activity more effectively and minimizes the response times for urgent or emergency situations involving migrants. *Id.* Additionally, the lighting, cameras, and detection technology that are part of the barrier system will provide awareness when breaching activity, *i.e.*, attempts to cut or otherwise damage or undermine the physical barrier, is detected, which is anticipated to reduce long-term maintenance and repair costs. *Id.*

5. The Amendment states that fiscal year 2018 and 2019 funds are available for the installation of barrier system attributes in areas of the United States Border Patrol’s Rio Grande Valley Sector where physical barriers were constructed using those appropriations. *See* Amendment § II. Further, fiscal year 2020 and 2021 funds are available for the installation of attributes in areas where DoD previously constructed barrier with military construction or counter-drug funding. *See id.* §§ III.B, IV.B. Installation of barrier system attributes will be carried out in a matter consistent with the planning criteria set forth in section III of the Plan. *See id.* §§ II–IV.

6. The Amendment also sets forth policy guidance for the prioritization of barrier systems funds appropriated in fiscal years 2018–2021. Consistent with section III of the Plan, DHS has prioritized funding projects with its fiscal year 2018 and 2019 appropriations that address life, safety, environmental, and other remediation requirements. *See* Amendment § II. DHS also has worked to identify actions that may be undertaken to remediate or mitigate environmental damage caused by past barrier construction. *Id.* DHS intends to continue to prioritize the expenditure of the fiscal year

2018 and 2019 appropriations to address remediation and mitigation requirements from past barrier construction undertaken with those appropriations. *Id.* Additionally, DHS intends to prioritize using its fiscal year 2018 and 2019 appropriations to complete the installation of attributes in areas where barrier was previously constructed with these funds. *Id.* For the fiscal year 2020 and 2021 appropriations, the Amendment explains that DHS intends to prioritize funding for installation of attributes as well as close-out, remediation, and mitigation activities at the former DoD barrier project sites. *See id.* §§ III–IV. Decisions about future expenditure of DHS appropriations from fiscal years 2018–2021 for these priority purposes will be made on an individualized project-by-project basis. *Id.* § I.

STATUS OF THE FISCAL YEAR 2020 AND 2021 BARRIER SYSTEM APPROPRIATIONS

7. Defendants’ opposition to the motion for preliminary injunction filed by Texas and Missouri explained how DHS intended to spend the appropriated barrier system funds it received in fiscal years 2020 and 2021. *See* Declaration of Paul Enriquez ¶¶ 11–38 (ECF No. 24-3) (December 8, 2021). Defendants hereby provide updated information about the status of the fiscal year 2020 and 2021 barrier system funds in light of the Amendment. *See* Second Enriquez Decl. ¶¶ 16–29.

A. Fiscal Year 2020 Barrier System Appropriation

8. In fiscal year 2020, Congress appropriated \$1,375,000,000 to U.S. Customs and Border Protection (CBP) for the construction of barrier system along the southwest border. *See* Public Law 116-93, Div. D, Tit. II, § 209(a)(1). This funding remains available for obligation until September 30, 2024. *See* Second Enriquez Decl. ¶ 18.

9. As explained in Defendants’ opposition to the motion for preliminary injunction, as of March 2021, CBP had obligated \$1.32 billion of the \$1.375 billion appropriated in fiscal year 2020 for barrier system construction. *See* ECF No. 24 at ¶ 25. CBP utilized its fiscal year 2020 appropriations to fund four contracts—two awarded by CBP and two awarded by the U.S. Army Corps of Engineers—that would provide for the design and construction of approximately 70 miles of border barrier system in the Laredo Sector. *Id.* ¶ 26. At the time the President issued his Proclamation in January 2021,

construction had not begun on any of the Laredo Sector projects and CBP had not acquired any of the permanent interests in real property necessary to support construction. *Id.* ¶ 27. CBP therefore focused on conducting a thorough review and replanning process for the Laredo projects, as set forth in the DHS Plan. *Id.* ¶ 28.

10. Because of the time required to complete environmental planning for the Laredo projects, and to ensure that the government did not incur substantial additional delay and other costs while such planning was carried out, CBP and the Army Corps of Engineers took action to modify and terminate the four contracts. *Id.* ¶ 30. CBP modified the two contracts it awarded to remove the construction portion of the contracts and the Army Corps of Engineers terminated for the convenience of the federal government the two contracts it awarded. Second Enriquez Decl. ¶ 21. All four contractors provided CBP with design packages that were developed prior to the suspension of work, which were incomplete. *Id.* For the CBP-awarded contracts, modifications to resolve final contract costs were completed in the second quarter of 2022. *Id.* The Army Corps of Engineers is still in the process of negotiating final contract costs and closeout. *Id.* Through the modification and cancelation of the Laredo contracts, CBP has recovered a substantial portion of the fiscal year 2020 barrier system appropriation. *Id.* ¶ 22. Approximately \$1,067,000,000 billion in 2020 funds are now available for obligation. *Id.* CBP anticipates recovering approximately \$90,000,000 of additional fiscal year 2020 funds that were provided to the Army Corps of Engineers for the Laredo contracts. *Id.*

11. Going forward, in light of the policy guidance set forth in the Amendment, CBP will prioritize the expenditure of the remaining 2020 funds: (1) to provide additional funding to remediate and mitigate damage caused by past barrier construction in the former DoD project areas; and (2) to install system attributes in those portions of the former DoD project areas where DoD constructed physical barrier. *Id.* ¶ 23. Based on current funding and cost protections, CBP expects to spend the remainder of its fiscal year 2020 barrier system appropriation on these two priority actions. *Id.*

12. As a result of prioritizing fiscal year 2020 funds for these purposes, CBP will take steps to terminate the environmental planning process that was initiated for new barrier system in the Laredo Sector. *Id.* ¶ 24. CBP will continue to expend fiscal year 2020 funds to conduct an orderly wind down

of those planning activities. *Id.* Once the termination process has concluded, CBP will no longer spend fiscal year 2020 funds on barrier system planning or construction activities in the Laredo Sector. *Id.* Instead, CBP will prioritize spending its remaining fiscal year 2020 funds on remediation and mitigation requirements at the former DoD project sites and installation of barrier system attributes at locations where DoD constructed physical barrier. *Id.*

B. Fiscal Year 2021 Barrier System Appropriation

13. In fiscal year 2021, Congress appropriated \$1,375,000,000 for the construction of barrier system along the southwest border. *See* Public Law 116-260, Div. F, Tit. II, § 210. This funding remains available for obligation until September 30, 2025. Second Enriquez Decl. ¶ 26.

14. As of June 30, 2022, CBP has obligated \$189,750,000 of the \$1,375,000,000 that was made available in the fiscal year 2021 barrier system appropriation. *Id.* ¶ 27. These obligations included necessary expenditures to address life, safety, environmental, or other remediation requirements, programmatic expenses, and contract costs for stakeholder engagement and environmental support services. *Id.*

15. Going forward, in light of the policy guidance set forth in the Amendment, CBP will prioritize the expenditure of the remaining 2021 funds: (1) to continue funding remediation and mitigation actions to address damage caused by past barrier construction in the former DoD project sites; and (2) to install system attributes in those portions of the former DoD project areas where DoD constructed physical barrier. *Id.* ¶ 28. Based on current funding and cost protections, CBP expects to spend the remainder of its fiscal year 2021 barrier system appropriation on these two priority actions. *Id.*

16. CBP had intended to use its fiscal year 2021 appropriation to fund environmental planning and stakeholder outreach for CBP's next highest priority barrier segments in the El Centro Sector in California. *See* ECF No. 24 at ¶ 33. That planning process has not begun, and no fiscal year 2021 funds have been expended for this purpose. Second Enriquez Decl. ¶ 29. Because CBP expects that the costs of the two priority actions discussed above will account for all remaining 2021 funding, CBP

will no longer move forward with environmental planning and stakeholder outreach for its next highest priority barrier segments in the El Centro Sector. *Id.*

Dated: July 12, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Andrew I. Warden²
ANDREW I. WARDEN (IN Bar #23840-49)
Senior Trial Counsel
MICHAEL J. GERARDI
(D.C. Bar #1017949)
Trial Attorney / Attorney-in-Charge
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW, No. 7506
Washington, D.C. 20005
Tel: (202) 616-5084
Fax: (202) 616-8470
E-mail: Andrew.Warden@usdoj.gov

² Signed with permission of the attorney-in-charge in accordance with Local Rule 11.3.

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2022, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system.

Parties may access this filing through the Court's CM/ECF System.

/s/ Andrew I. Warden
ANDREW I. WARDEN